cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court." The court then denies that creditors have any right to complain because they are denied access to property devised or granted under such conditions. The grant or devise is matter of record, and creditors cannot be deceived or misled, as the conditions under which the property is held, being matter of record, inform them that they must not trust to the property so held. What right then have creditors to complain? If they have no right to complain, who is there to complain? If no one can complain, and if it is not, as the Supreme Court of the United States affirms, a necessary incident of property that it should be subject to involuntary alienation, what reason is there which makes it necessary that the property should be granted in trust in order to protect it from involuntary alienation? Upon principle we cannot see why any distinction should be made between the two cases.

HENRY WADE ROGERS.

Supreme Judicial Court of Massachusetts.

UNION INSTITUTION FOR SAVINGS *v.* CITY OF BOSTON ET AL.

On a debt which by express contract is payable at a specified future time, and until then is to bear a certain rate of interest, the same rate is to be allowed after maturity and until payment of the principal, whether it be called an incident or part of the debt, or damages for non-payment.

The cases on this subject carefully examined.

THIS was a bill in equity by a mortgagee of land taken by the city for the public use, to enforce a lien upon the money due from the city for damages for such taking. By the terms of the mortgages, the amounts of the mortgage debts were to be paid in five years, which had elapsed some time before the filing of the bill, "with interest semi-annually, at the rate of seven and a half per centum per annum;" and the question raised was, at what rate the interest should be computed for the time since the principal sums became due.

By the stat. of 1867, c. 56, sect. 1, the legal rate of interest in Massachusetts is six per cent. a year, when there is no agreement for a different rate; and by sect. 2, it is lawful to contract for any rate of interest, "provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing."

The opinion of the court was delivered by

GRAY, C. J.—When a written agreement is made, as authorized by the statute, to pay a greater rate of interest yearly than six per cent., the intention of the contract and the effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that, in an action upon the contract, the creditor shall recover interest at that rate, not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established.

In *Brannon* v. *Hursell*, 112 Mass. 63, it was accordingly held, in an action upon a promissory note payable in four months "with interest at ten per cent.," that interest was to be computed at that rate, not merely to the maturity of the note, but to the time of the verdict; and upon reconsideration of the authorities there referred to, and examination of the numerous decisions cited at the argument of the present case, we see no reason to overrule or qualify the point adjudged, although the statement in the opinion that "the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt," might well be modified so as to say that the interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured, according to the intention manifested by the contract, by the standard thereby established.

In *Price* v. *Great Western Railway*, 16 M. & W. 244, 248, Baron PARKE said that the reason why, under a mortgage deed whereby interest is payable up to a certain day, interest beyond that day might be recovered as damages, was "because the deed shows the intention of the parties that it should be a debt bearing interest;" and added, "The jury give it as damages for the detention of the debt. It is not recoverable as interest on the contract itself."

In *Morgan* v. *Jones*, 8 Exch. 620, the owners of a vessel mortgaged it as security for a debt, with a proviso for a redemption on payment of the principal and interest at the rate of ten per cent. in six months, but without any provision for payment of interest after that time. The principal not being paid then, it was held by Chief Baron POLLOCK and Barons PARKE, PLATT and MARTIN that the mortgagee was entitled to interest at the same rate until

payment; and Baron PARKE said: "It was a sale of a chattel, redeemable on a certain day; then, if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable. It is exactly like a mortgage of real estate, where the mortgagee becomes the legal owner."

So in *Keene* v. *Keene*, 3 C. B. (N. S.) 144, an action by an indorsee against the drawer of a bill of exchange for 200*l.*, payable in twelve months, with interest at the rate of ten per cent. per annum, was referred to a master, who allowed ten per cent. interest after, as well as before, the maturity of the bill. The defendant moved to recommit the case to the master; and argued that there was no implied contract on the part of the drawer, upon the acceptor's default, to pay more than the ordinary interest of five per cent.; that the acceptor could only be liable to interest at five per cent. after maturity of the bill; and that the bill was in effect a bill for 220*l.* But the court overruled the motion. Mr. Justice WILLES said: "Until the maturity of the bill, the interest is a debt; after its maturity, the interest is given as damages at the discretion of the jury. Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed; and the master is substituted for a jury." Chief Justice COCKBURN said: "I see no ground for referring this case back to the master, as prayed. He has, as he well might, given in the shape of damages the rate of interest the parties themselves had contracted for. I think he has done quite right." Mr. Justice CROWDER said: "I am of the same opinion. The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as to the value of the money." And Mr. Justice WILLIAMS concurred.

In *Cook* v. *Fowler*, L. R., 7 H. L. 28, a debtor, on May 2d 1864, gave a warrant of attorney to a creditor "to secure the payment of the sum of 1330*l.*, with interest thereon at and after the rate of 5*l.* per cent. per month, on the 2d of June next, judgment to be entered up forthwith; and in case of default in payment of the said sum of 1330*l.* and interest thereon, on the day aforesaid, execution or executions and other processes may then issue for the said sum of 1330*l.* with interest, together with costs of entering up judgment, &c., &c., and all other incidental expenses whatever." The debtor died before the second of June, and no judgment was entered up. The creditor, who also held mortgages on lands of his

debtor, concealed his warrant of attorney for three years, and then set it up in answer to a bill of the executors against him for an account, and more than a year later first claimed to be allowed interest for the whole time at the rate of sixty per cent. a year. It was held by the House of Lords, affirming a decree of Vice Chancellor STUART, that he was entitled after the 2d of June 1864, to ordinary interest only; and this upon two grounds: 1st. That the warrant of attorney and the defeasance did not create a contract, but only an authority to enter up judgment on June 2d 1864, and a stipulation that execution might then issue. 2d. The extraordinary and excessive rate of interest, and the conduct of the creditor.

Although Lord CHELMSFORD (apparently overlooking the cases of *Morgan* v. *Jones* and *Keene* v. *Keene*, above cited) said, "There is no authority that I can find to support the argument of the counsel for the appellant, that when a security for money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards:" L. R., 7 H. L. 35; Lord Chancellor CAIRNS and Lord SELBORNE were clearly of a different opinion. The Lord Chancellor said that, according to the well-known principle, which had been referred to in many cases, "any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *primâ facie*, the rate of interest stipulated for up to the time certain, might be taken, and generally would be taken, as the measure of interest; but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages:" pp. 32, 33. And Lord SELBORNE said: "Although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a court or jury, as a proper measure of damages for the subsequent delay; but that is because,

ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to:" pp. 37, 38.

In a later case, Lord Justice AMPHLETT considered it to be clearly established by the previous decisions, that in the case of a mercantile security it is to be supposed that the parties intended interest to run on at the old rate, if the money was not paid at the date; and so, in the redemption of mortgages, although the day for payment has passed and there is no provision with the creditor for payment of interest after that day, the court will assume that interest is payable after the day at the same rate as before, and that, although what has to be paid may technically be called damages, they are damages of a peculiar kind, for it would not be left to a jury to regulate the amount; but the jury would be directed, as a matter of law, to find damages of the same amount as the interest, which would have been payable, if the promise had extended over the period: *Gordillo* v. *Weguelin*, 5 Ch. D. 287, 303.

In the very recent case of *In re Roberts*, 14 Ch. D. 49, where by a mortgage deed, reciting an agreement for a loan of 5000*l.*, at the rate of ten per cent. per annum, the mortgagor covenanted to pay in six months the sum of 250*l.*, being half a year's interest on the 5000*l.*, and in twelve months the sum of 250*l.*, being a further half year's interest, and also the principal sum of 5000*l.*, making together 5250*l.*, and made no covenant for the payment of interest in the event of the principal remaining unpaid after the day named for its repayment, but actually paid interest at the rate of ten per cent. for three years afterwards, and then died; and after a decree for administration of his estate, the mortgagee proved as a creditor for principal and interest; it was indeed held by Sir GEORGE JESSEL, M. R., and Lords Justices BRETT and COTTON, that he was entitled in such a suit to the interest at the rate of five per cent. only. But no decision upon the point appears to have been brought to the notice of the court, except *Cook* v. *Fowler*, above cited; and the case was decided upon the assumption that there was no precedent for giving more than the ordinary rate of interest by way of damages. Under such circumstances, the case cannot be considered, by a court not bound by it as authority, to outweigh the decisions of Chief Baron POLLOCK and Baron PARKE, of Chief Justice COCKBURN and Mr. Justice WILLES, and their associates, and

the opinions of Lord CAIRNS and Lord SELBORNE, above quoted. It may also be observed that the Master of the Rolls said (without giving any reason why the agreement of the parties should be allowed a greater effect by way of protection of the party who had broken his contract, than for the benefit of the party who by such breach had been deprived of the use of his money) that if the rate of interest named by the parties were below the ordinary rate, it would be the proper measure of damages; and that Lord Justice COTTON took the precaution to remark that the court was not deciding what rate of interest should be allowed in a suit for redemption.

Before the decision in *Brannon* v. *Hursell*, the rule there declared had been established in Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada and Tennessee: *Kilgore* v. *Powers*, 5 Blackf. 22; *Kohler* v. *Smith*, 2 Cal. 597; *Guy* v. *Franklin*, 5 Id. 416; *Corcoran* v. *Doll*, 32 Id. 82; *Hopkins* v. *Crittenden*, 10 Texas 189; *Wilson* v. *Marsh*, 2 Beasley 289; *Phinney* v. *Baldwin*, 16 Ill. 108; *Etnyre* v. *McDaniel*, 28 Id. 201; *Heartt* v. *Rhodes*, 66 Id. 351; *Spencer* v. *Maxfield*, 16 Wis. 541; *Pruyn* v. *Milwaukee*, 18 Id. 367; *Hand* v. *Armstrong*, 18 Iowa 324; *Thompson* v. *Pickel*, 20 Id. 490; *McLane* v. *Abrams*, 2 Nev. 199; *Overton* v. *Bolton*, 9 Heisk. 762. It has since been affirmed by decisions of the highest courts of Ohio, Michigan and Virginia: *Monnett* v. *Sturges*, 25 Ohio St. 384; *Marietta Iron Works* v. *Lottimer*, Id. 621; *Warner* v. *Juif*, 38 Mich. 662; *Cecil* v. *Hicks*, 29 Gratt. 1. And it has been acted on by Judge LOWELL in the Circuit Court of the United States for this district: *Burgess* v. *Southbridge Savings Bank*, 2 Fed. Rep. 500.

In Connecticut, the law seems formerly to have been considered as settled in accordance with these decisions, and although some recent *dicta* have a tendency to explain away the grounds assigned in the earlier judgments, there is no adjudication to the contrary: *Beckwith* v. *Hartford, Providence & Fishkill Railroad Co.*, 29 Conn. 268; *Adams* v. *Way*, 33 Id. 419; *Hubbard* v. *Callahan*, 42 Id. 524, 537; *Suffield Ecclesiastical Society* v. *Loomis*, Id. 570, 575; *Seymour* v. *Continental Ins. Co.*, 44 Id. 300.

The earlier decisions in New York support the same rule, both as to mortgages and as to ordinary debts: *Miller* v. *Burroughs*, 4 Johns. Ch. 436; *Van Beuren* v. *Van Gaasbeck*, 4 Cowen 496. But in the light of later cases, the question may perhaps be con-

sidered an open one in that state. See *Bell* v. *Mayor of New York*, 10 Paige 49; *Hamilton* v. *Van Rensselaer*, 43 N. Y. 244; *Ritter* v. *Phillips*, 53 Id. 586. It may be doubted, however, whether the cases of *Macomber* v. *Dunham*, 8 Wend. 550, and *United States Bank* v. *Chapin*, 9 Id. 471, sometimes referred to in discussions of the subject, are really applicable. In one of them the decision was that a corporation, authorized by its charter to charge interest for a full month on loans for more than fifteen days and less than a month, could not demand interest at the same rate during subsequent months while such a loan remained unpaid. In the other, the only point decided was, that a bank, limited by statute to six per cent. interest on all discounts, was not thereby prevented from recovering the legal rate of seven per cent. as damages after breach of the contract by the other party. Each case turned, not upon the terms of a contract, but upon the effect of a peculiar statute, the scope of which was clearly defined and limited. And in neither of them is there any intimation of an intention to overrule the decision of Chancellor KENT in *Miller* v. *Burroughs*, or that of Chief Justice SAVAGE and Justices SUTHERLAND and WOODWORTH in *Van Beuren* v. *Van Gaasbeck*. The case of *Kitchen* v. *Mobile Bank*, 14 Ala. 233, is like *United States Bank* v. *Chapin*.

In *Ashuelot Railroad Co.* v. *Elliott*, 57 N. H. 397, 437, 439, cited for the defendant Farnsworth, the point decided was, that upon bonds bearing interest at the rate of six per cent. annually, payable half-yearly, interest after maturity, and payment of all the coupons, should be computed in equity at the rate of six per cent., without annual or other rests; in short, that compound interest should not be allowed in a suit on the principal debt. That decision, in effect overruling *Peirce* v. *Rowe*, 1 N. H. 179, accords with the general current of authority, in equity as well as at law: *Ferry* v. *Ferry*, 2 Cush. 92; *Connecticut* v. *Jackson*, 1 Johns. Ch. 13; *Van Benschooten* v. *Lawson*, 6 Id. 313; *Mowry* v. *Bishop*, 5 Paige 98; *Sparks* v. *Garrigues*, 1 Binn. 152, 165; *Stokely* v. *Thompson*, 34 Penn. St. 210; *Doe* v. *Warren*, 7 Greenlf. 48; *Parkhurst* v. *Cummings*, 56 Maine 155. It does not affect the question before us.

The leading cases in support of the defendant's view are *Ludwick* v. *Huntzinger*, 5 W. & S. 51, and *Brewster* v. *Wakefield*, 22 How. 118.

In *Ludwick* v. *Huntzinger*, it was held by the Supreme Court of Pennsylvania, that on a bond for the payment of money in twenty-one months, with three per cent. interest from date, the obligee was entitled to recover three per cent. interest until the time fixed for payment, and six per cent. afterwards.

In *Brewster* v. *Wakefield*, it was held by the Supreme Court of the United States (reversing the judgment of the Supreme Court of the territory of Minnesota in 1 Minn. 352), that upon a mortgage to secure notes which respectively stipulated for the payment of interest at the yearly rates of twenty-four and twenty-five per cent., where the rate fixed by statute, in the absence of express agreement, was seven per cent., interest at the rate of seven per cent. only, could be recovered after the maturity of the notes. Chief Justice TANEY, in delivering judgment, said: "The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And, in this view of the subject, we think the territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law where there was no contract to regulate it." He then referred to the cases of *Macomber* v. *Dunham*, *United States Bank* v. *Chapin*, and *Ludwick* v. *Huntzinger*, above stated, and added: "Nor is there anything in the character of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent. per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact, from the necessities of a borrower, more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms, for, with such a claim, he must stand upon his bond."

The same rule appears to have been followed by the Supreme Court in a case from the territory of Utah: *Burnhisel* v. *Firman*, 22 Wall. 170. And it has since been adopted as a general rule by the courts of Kansas, Minnesota, South Carolina, Rhode Island, Kentucky, Arkansas and Maine: *Robinson* v. *Kinney*, 2 Kansas 184; *Lash* v. *Lambert*, 15 Minn. 416; *Moreland* v. *Lawrence*, 23 Id. 84; *Langston* v. *South Carolina Railroad Co.*, 2 So. C.

(N. S.) 248; *Pearce* v. *Hennessy*, 10 R. I. 223; *Rilling* v. *Thompson*, 12 Bush 310; *Newton* v. *Kennerly*, 31 Ark. 626; *Duran* v. *Ayer*, 67 Maine 145; *Eaton* v. *Boissonnault*, Id. 540.

But the later judgments of the Supreme Court exhibit a difference of opinion as to the general rule, though not of adjudication in the particular cases before the court.

In *Cromwell* v. *County of Sac*, 96 U. S. 51, which arose in the Circuit Court of the United States for the District of Iowa, upon a bond given in Iowa, and stipulating for the payment of ten per cent. interest, Mr. Justice FIELD, delivering the judgment of the Supreme Court, treated the decision in *Brewster* v. *Wakefield* as based upon the exorbitant rate of the interest, and after referring to *Brannon* v. *Hursell*, and many of the other American cases above cited, said: "The preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment." And it was held, reversing in this respect the judgment of the Circuit Court, that the construction given by the Supreme Court of Iowa to the statute of that state was conclusive, and that interest must be computed at the rate expressed in the contract to the time of judgment.

On the other hand, in the case of *Holden* v. *Trust Co.*, 100 U. S. 72, which arose in the District of Columbia, under a statute like ours, except in not allowing the parties to stipulate for interest at a greater rate than ten per cent., it was held, upon a bill in equity, that on a note made payable in four years, with interest at the rate of ten per cent., payable semi-annually, and secured by a conveyance of real estate in trust, interest from the maturity of the note should be computed at the ordinary rate of six per cent. only, and Mr. Justice SWAYNE, in delivering judgment, said: "The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate: *Brewster* v. *Wakefield*, 22 How. 118; *Burnhisel* v. *Firman*, 22 Wall. 170. Where a different rule has been established, it governs, of course, in that locality. The question is always one of local law. This subject was fully examined in the recent case in this court of *Cromwell* v. *County of Sac*, 94 U. S. 351. [The reference intended is evidently 96 U. S. 51, above cited.] We need not go over the ground again. Here

the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to everything beyond that, it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred."

The law upon this subject, as declared by the Supreme Court of the United States, would appear to be that in the District of Columbia or in a territory of the United States, the rate of interest agreed by the parties in the usual form is recoverable to the stipulated time of payment only, and the statute rate of interest afterwards, but that cases arising in any state must be governed by the local law, as expounded by its courts.

Two observations may be made on the judgments which are opposed to the decision in *Brannon* v. *Hursell.* 1st. They admit that the intent of the parties, if expressed with sufficient clearness in their contract, will govern the rate of interest to the time of judgment: *Brewster* v. *Wakefield* and *Holden* v. *Trust Co.*, above cited; *Pearce* v. *Hennessy*, 10 R. I. 227; *Capen* v. *Crowell*, 66 Maine 282; *Paine* v. *Caswell*, 68 Id. 80; *Gray* v. *Briscoe*, 6 Bush 687; *Young* v. *Thompson*, 2 Kansas 83. 2d. They assume, in opposition to the leading English cases, that if interest after the maturity of the contract is to be recovered, not as interest, but as damages, it must necessarily be estimated at the ordinary rate.

The question being, as is clearly recognised in the two most recent judgments of the Supreme Court of the United States, one of local law, in deciding which this court is not bound by the opinion of any other tribunal, we are constrained, with great respect for those who take a different view of the subject, to say that the rule established in this Commonwealth by the adjudication in *Brannon* v. *Hursell* appears to us to best accord with the purpose of the legislature, with the apparent intention of the parties, with the usage and understanding of men of business, with the weight of legal reasoning and authority, and with the principles of equity that govern the enforcement and redemption of mortgages.

In the case before us, each of the mortgages to the plaintiff,

duly recorded, and subject to which the defendant Farnsworth took his title, makes the payment by the mortgagors of the principal debt in five years, "with interest semi-annually at the rate of seven and a half per cent. per annum," a condition upon which the mortgage, and "one note of even date herewith" whereby the mortgagors "promise to pay the said corporation or order the said sum and interest at the times aforesaid," shall be void. Each of the notes thus referred to does in the most explicit terms require interest to "be paid semi-annually at the rate of seven and a half per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid;" and the description of the debt and interest in the mortgage might be held sufficient to give any one taking the land subject to the mortgage such information that he could not redeem the land without paying interest according to the stipulation in the notes, even if by that stipulation such interest was to be computed for a longer period than would appear upon the face of the mortgage taken by itself: *Richards* v. *Holmes*, 18 How. 143; *Ackens* v. *Winston*, 7 C. E. Green 444. But we do not decide that point, because we are of opinion, on the grounds already stated, that the legal effect of the provision of the mortgage is the same as that of the fuller language of the note.

The stipulated rate is only one-fifth of one per cent. per year higher than the interest payable upon some notes of the United States, and there is no pretence that it is unconscionable or unreasonable. The claim upon the money received by Farnsworth from the city is no less than it would have been against the land for which that money is a substitute: *Farnsworth* v. *Boston*, 126 Mass. 1. As he might at any time have stopped the running of the interest after the maturity of the notes by performing his obligation and paying the mortgage debt, neither the lapse of time nor the other circumstances of the case afford any reason why the plaintiff should not recover interest at the stipulated rate to the time of the decree.

Decree affirmed.